

The Convention on the Rights of Persons with Disabilities and Legal Education

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Abstract

Whilst international and regional human rights frameworks have all been built on the idea of equality and non-discrimination, delays in achieving such equality for persons with disabilities have led to new international standards designed to reinforce the need for speedy implementation of rights in an equal fashion. The Convention on the Rights of Persons with Disabilities 2006 requires, amongst other things, equal access to tertiary education for persons with disabilities. In addition, it requires equal access to professions and careers for which a university degree is invariably a pre-requisite, including the legal profession.

It is therefore necessary for law schools to consider their obligations in this regard, both as constituent parts of academic institutions and as partners with practitioners and the judiciary in the legal profession. This paper considers the implications of this obligation. It examines the following questions:

First, (a) What is the content of the right to legal education (and tertiary education more generally) for persons with disabilities? (b) What is the content of the right to be a member of the legal profession (and other professions) for persons with disabilities?

Secondly, in light of the answer to the first question, what is the content of the obligation upon universities to provide access to tertiary education to persons with disabilities, both as a general matter and more specifically to such tertiary education as is necessary as a precursor to progress within a profession or career?

Thirdly, in light of the answers to these first two questions, what should law schools be doing in terms of leadership roles within universities to ensure compliance with human rights standards, working with professional bodies to assist their participation with these standards, and designing the law school curriculum and admissions policies?

Key words: Human rights; non-discrimination; education for persons with disabilities; the role of Law Schools.

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I. Introduction

In order to set the scene for an account of the potential impact on tertiary education of non-discrimination principles, the status of those principles is noted. It is apparent from the texts of the human rights regime that has developed under the United Nations that a core value is the promotion of equality. Hence, the Universal Declaration of Human Rights 1948 (UDHR)⁽¹⁾ opens with the assertion that “All human beings are born free and equal in dignity and rights”, and then adds in Article 2 that the various rights enumerated are to be enjoyed by all persons “without distinction of any kind” based on any form of status; and by the indication in Article 7 that one right is that to being “equal before the law” and being “entitled without any discrimination to equal protection of the law”. The article further proclaims that “All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination”.

Joining the UDHR to form the International Bill of Rights is the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR)⁽²⁾ and the International Covenant on Civil and Political Rights 1966 (ICCPR).⁽³⁾ Both have equality provisions at their centre. Common Article 1 supports the self-determination of peoples, which reflects a direct challenge to colonialism. Article 2(2) of the ICESCR specifies that the rights it contains have to be guaranteed “without discrimination of any kind” arising from status; Article 2(1) of the ICCPR refers to the absence of any “distinction”, and its Article 26 reflects Article 7 of the UDHR, stating that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

(1) Resolution 217(III) of 10 December 1948; the text is available at <http://www.un.org/en/universal-declaration-human-rights/index.html>. The UN Charter of 26 June 1945, 1 UNTS XVI, entered into force 24 October 1945, available at <http://www.un.org/en/charter-united-nations/index.html>, is also to be noted: its preamble refers to the desire “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women ...” – this need to reaffirm is also a textual indication of the purpose in place.

(2) International Covenant on Economic Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976).

(3) International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

This confirms that protection against discrimination in relation to anything set out in law is itself a civil and political right. The importance of this characterisation is that there is a basic distinction between economic, social and cultural rights on the one hand and civil and political rights on the other. Article 2(1) of the ICESCR requires states to use “all appropriate means, including particularly the adoption of legislative measures” for the purpose of “achieving progressively the full realization of the rights”: this allowance of time to secure rights if needs be is subject to a duty to use “the maximum of its available resources”.⁽⁴⁾ However, there is no reference to resources at all in the equivalent provisions of the ICCPR: rather, the entitlement to rights without discrimination is in the context of a more general duty on states owed “to all individuals within its territory and subject to its jurisdiction” to “respect and ... ensure” the rights set out in the Covenant (Article 2(1)) and a more specific duty to “take the necessary steps ... to adopt such legislative or other measures as may be necessary to give effect to the rights” set out (Article 2(2)).⁽⁵⁾ This obligation arises if those rights are “not already provided for by existing legislative or other measures”, but there is no reference to progressive realisation or to restricted resources having any relevance.

The Committee on Economic, Social and Cultural Rights has noted that the progressive realisation obligation in the ICESCR “differs significantly from that contained in article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights”.⁽⁶⁾ Making non-discrimination a free-standing civil and political right by reason of Article 26 of the ICCPR means that it cannot

(4) Moreover, the appropriate steps have to be taken “individually and through international assistance and co-operation, especially economic and technical”.

(5) Article 8 of the UDHR also refers to the right to an effective remedy for breaches of fundamental rights in domestic law; Article 2(3)(a) of the ICCPR, after the obligation to secure rights, also requires a remedy, including when a breach occurs at the hands of those acting for the state, which remedy should involve whichever body is competent within the national legal system, which might be “judicial, administrative or legislative authorities”, though there is express reference to the need “to develop the possibilities of judicial remedy” (Article 2(3)(b)) and should be enforced by “the competent authorities” (Article 2(3)(c)).

(6) CESCR *General Comment No 3: The Nature of States Parties' Obligations (Art 2, Para. 1, of the Covenant)* E/1991/23 (1990) at [9]. The Committee nevertheless notes that economic, social and cultural rights, of which one is the right to education, as is discussed below, requires states “to move as expeditiously and effectively as possible towards” the goal of “the full realization of the rights in question”. This reflects the role of the progressive realisation standard as “a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights”. See also Human Rights Committee, *General Comment No. 31 The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add. 13 (2004), in which the Human Rights Committee expands upon the obligations as to implementing rights in the ICCPR.

be deferred by reason of arguments based on resources. In short, if any economic, social and cultural right is reflected in law, there is a civil and political right not to be subject to any discrimination in relation to that right. Rather, as is made clear in Article 26 of the ICCPR, there is a need for “equal and effective protection”.

The entrenched nature of discrimination has led to supplemental treaties that explain further how to achieve equality in rights for various groups who have often been subject to discriminatory treatment on account of various features (race, gender, youth, migrant worker status and disability). The focus of this article is the role of the Convention on the Rights of Persons with Disabilities 2006 (CRPD)⁽⁷⁾ in explaining the effect of non-discrimination principles in the context of legal education. It is therefore appropriate to set out the core concepts and definitions in this Treaty.

It should be noted, first, that there is at most a partial definition of who is covered. Article 1 notes that “Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”. A wider conception supplementing this non-exhaustive definition is given in paragraph (e) of the Preamble, where it is noted that “disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others”.

Secondly, what amounts to “discrimination on the basis of disability” is defined in Article 2:

“Discrimination on the basis of disability” means any distinction, exclusion or restriction on the basis of disability which has the purpose *or effect* of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, *including denial of reasonable accommodation*. (Emphasis added.)

The first emphasised word makes clear that impact is also important,

(7) Convention on the Rights of Persons with Disabilities 2006 2515 UNTS 3 (opened for signature 13 December 2006, entered into force 3 May 2008).

not just intention; the second is an important concept also defined in Article 2 in the following terms:

“Reasonable accommodation” means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

Also defined in Article 2 is “Universal design”, namely “the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design”. The link between the two definitions is apparent: the more universal the design, the less need there will be for supplements to be made by way of reasonable accommodation.

These concepts will feature below. Having outlined the centrality of non-discrimination principle in Part I, Part II turns to the content of the right to tertiary education including legal education, and the right to become a member of the legal profession, for persons with disabilities: this is the main substantive part of the paper, which draws on the well-established principles as to inclusive education and the recognition of the central role of education in many matter to seek to illuminate the content of the right to tertiary education in the context of persons with disabilities. Part III then turns to the implementation of these rights via tertiary institutions, and in particular the steps that law schools could be taking, assuming that they take a leadership role within universities in ensuring that rights are respected and assuming that they liaise with the legal profession and judiciary in this regard, but also reflecting on their own curriculum design and admissions policies.

II. The Right to Tertiary Education

In this section, there is an outline of the right to education in general, including its development as a right to an inclusive education process for persons with disabilities. Then, there is a discussion of the tertiary level aspect of the right to education, and of the supporting rights in play, including the ability to work in various professions. The implications of non-discrimination principles in this context are also discussed.

A. The Right to Education – Existence and Elements in the International Bill of Rights

The right to education features in the UDHR, Article 26 of which sets out the following:

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
3. Parents have a prior right to choose the kind of education that shall be given to their children.

The several elements of this language include that, first, there is a right to education, and so it is not a matter of privilege or discretion. Secondly, the right covers all stages of education, basic, higher, technical and professional. Thirdly, it is a right that everyone has, at least at first sight. A fourth element relates to the involvement of parents in choosing education for their children. A fifth element looks to the fact that the right to education is a building block to other things, both for the individual (“the full development of the human personality”) and society (the support of a tolerant and peaceful world). Finally, there is a sixth point, which is relevant as a potential caveat on the third element noted above. Education has to be free in the initial stages, which helps with the characterisation of something as a right, since issues of access based on ability to pay may raise a question-mark as to this characterisation. However, two points are to be noted. First, the suggestion that it has to be free “at least” at those initial stages may lead to an argument that it need not be free thereafter: this is discussed below, and the central point arising is that the absence of any reference to education necessarily being free beyond the initial stages does not necessarily mean that it need not be free at those stages. Secondly, the reference to access to higher education “on the basis of merit” may provide a gloss on entitlement, albeit that differentiation of access on any basis other than merit is not permitted: that would be counter to the general

non-discrimination language found in Articles 2 and 7 of the UDHR.

The UDHR lists a variety of rights without drawing the distinction that is now drawn between those that are “civil and political” and those that are “economic, social and cultural”; however, the right to education is in a group of rights that were to gain the latter moniker. When treaties were drafted within the UN Treaty System to give legal effect in international law to the UDHR, the right to education was provided for in Article 13 of the ICESCR in the following terms:

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.
2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
 - (a) Primary education shall be compulsory and available free to all;
 - (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
 - (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
 - (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
 - (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.
3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their

children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

The elements of this language expand upon what is set out in the UDHR: there is a right, it covers all stages of education,⁽⁸⁾ and it belongs to everyone. It is, naturally, subject to the progressive realisation obligation of Article 2, the speed of which is reflected by the duty to use the maximum of available resources. The obligation in Article 13(2)(e) to take practical steps to ensure that there are schools and educators reflects this. The power of parents and guardians to choose the education of their children is expanded upon from its mention in the UDHR, with the allowance for private educational institutions (Article 13(4)). There is also additional language as to the role of education as a building block to other things, though this does not differ fundamentally from what was in the older document.

Turning to higher education, there is an express indication that it should be free (progressively so, which is also consistent with the general requirement of Article 2); and the reference to admission based on “merit” is replaced by a reference to “capacity” to undertake tertiary study. This reference to “capacity” was not thought by the Committee on Economic, Social and Cultural Rights to have made a difference from the UDHR’s reference to access based on merit. In its *General Comment No 13: the Right to Education*,⁽⁹⁾ the Committee notes

(8) This includes in Article 13(2)(d), education later in life for those who did not complete primary education. The particularly vital role of primary education is evident, however, from the provisions of Article 14: this states that “Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all”. The specificity of this language means that it overrides any limitations apparent from the general provisions in Article 2 as to the progressive realization process.

(9) Committee on Economic, Social and Cultural Rights *General Comment No 13: the Right to Education*, E/C.12/1999/10, 8 December 1999.

that this provides a distinction from the approach in relation to primary and secondary education, which have to be available to all, and considers that the assessment of the capacity to undertake higher education “should be assessed by reference to all their relevant expertise and experience”.⁽¹⁰⁾

B. The Right to Education – Existence and Elements in the Non-Discrimination Treaties, including the Convention on the Rights of Persons with Disabilities 2006

In its human rights treaties that supplement the International Bill of Rights, several relate to the rights of specific groups and so reinforce the non-discrimination principles already noted. The first of these in time is the International Convention on the Elimination of Racial Discrimination 1965 (ICERD),⁽¹¹⁾ which contains the fundamental obligation in its Article 2 of both condemning racial discrimination and taking steps to eliminate it and encourage understanding between races. The undesired conduct is defined in Article 1 as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”. Article 5 then requires more specific steps, including in relation to education:

States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

- (e) Economic, social and cultural rights, in particular: ... (v) The right to education and training ...

The instrumental role of education noted in the UDHR and ICESCR in promoting the rights agenda is also reflected, Article 7 of ICERD involves the parties agreeing

to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating

(10) Committee on Economic, Social and Cultural Rights *General Comment No 13: the Right to Education*, E/C.12/1999/10, 8 December 1999, [19].

(11) International Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 195 (opened for signature 21 December 1965, entered into force 4 January 1969) [ICERD].

prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.

This instrumental role is made very clear in the Convention on the Rights of the Child 1989 (CRC).⁽¹²⁾ There is a right to education, which is set out in Article 28 and is in terms that are consistent with the International Bill of Rights. There is a right that has to be achieved “progressively and on the basis of equal opportunity” (Article 28(1)). Specific elements of this are also set out: (a) compulsory and free primary education, (b) general and vocational secondary education should be encouraged and made accessible (with reference made to financial assistance and making it free), “(c) Make higher education accessible to all on the basis of capacity by every appropriate means”, (d) providing accessible information and guidance on education and vocations, and (e) reducing truancy and dropping out. (There is also reference to the need for rights-compliant school discipline, and to international collaboration in best practice.) Article 29(1) picks up the aims of education, both to benefit the child and society. The former is made out by the aim of developing “(a) ... the child’s personality, talents and mental and physical abilities to their fullest potential”. The wider societal benefit is to be secured by developing respect for rights principles, for cultures (including the child’s own, the national culture and other cultures), for “responsible life in a free society” based on egalitarian principles, and for the natural environment. There is also specific reference in Article 23(3) to the right of children with disabilities to be educated, and in Article 23(4) to the importance of the dissemination of international best practice.

Other references in the CRC to education are in relation to its role in securing other rights or positive outcomes. Accordingly, Article 19 relates to the protection of children from all forms of mistreatment, and requires “1. ... all appropriate legislative, administrative, social and educational measures” to that end. Similarly, the right to health in Article 24 includes as specifics the need for education about various matters – “child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents” (Article 24(2)(e)); and “family planning education

(12) Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) [CRC].

and services” (Article 24(2)(f)). Article 32 requires that children be protected in work environments, including making sure that work does not adversely affect their education: and this is to be achieved through “legislative, administrative, social and educational measures” (Article 32(2)). Protection of children from illicit drugs requires “all appropriate measures, including legislative, administrative, social and educational measures” (Article 33). It is not immediately apparent why the reference to “all appropriate measures” that appears in Articles 19 and 33 is missing in Article 32.

Finally, Article 40, which sets out what is required in a rights-based criminal justice system for children, sets out the importance of a separate process including diversion and a range of dispositions including “education and vocational training programmes and other alternatives to institutional care” (Article 40(4)).

Another group to benefit from a specific treaty are migrant workers and their families: the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.⁽¹³⁾ This overlaps with ICERD (given that migrant workers may be from a different race than the majority in the country in which they are working) and the CRC (given that the families may include children). Accordingly, its Article 30 provides that the children of migrant workers have an equal right of access to education as nationals; and its Article 12(4) provides a reminder of the rights of parents and guardians to control in matters of moral and religious education. Under Articles 43(a) and 45(1)(a), migrant workers themselves and their families should have similar equality of access, which will cover ongoing education. It is also noted in Article 45(4) that education in the language of the migrant worker may be important.

Finally, in terms of UN treaties, there is the Convention on the Rights of Persons with Disabilities 2006 (CRPD).⁽¹⁴⁾ It includes a number of references to the value of education as a tool to support its wider aims. Hence, Article 8 of the CRPD has requirements as to raising awareness of both the rights and positive contributions to society of persons with disabilities, and one of the ways to achieve this is noted to be “Fostering at all levels of the education system, including in all children from an early age, an attitude of respect

(13) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 2220 UNTS 3 (opened for signature 18 December 1990, entered into force 1 July 2003) [ICRMW]

(14) Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 December 2006, entered into force 3 May 2008) [CRPD].

for the rights of persons with disabilities” (Article 8(2)(b)). Reflecting the approach noted above in Article 19 of the CRC, Article 16 of the CRPD is aimed to protect persons with disabilities from mistreatment, and in that role requires “all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects” (Article 16(1)). It also requires support and assistance to persons with disabilities and their families “including through the provision of information and education on how to avoid, recognize and report instances of exploitation, violence and abuse” (Article 16(2)). Education as to family planning is also mentioned as a right for persons with disabilities in relation to matters of home and family life (Article 23), as is the role of education services in securing habilitation and rehabilitation (Article 26).

The right to education in the CRPD, set out in Article 24 is in the following terms:

1. States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels and life long learning directed to:
 - (a) The full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;
 - (b) The development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential;
 - (c) Enabling persons with disabilities to participate effectively in a free society.
2. In realizing this right, States Parties shall ensure that:
 - (a) Persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;
 - (b) Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live;

- (c) Reasonable accommodation of the individual's requirements is provided;
 - (d) Persons with disabilities receive the support required, within the general education system, to facilitate their effective education;
 - (e) Effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion.
3. States Parties shall enable persons with disabilities to learn life and social development skills to facilitate their full and equal participation in education and as members of the community. To this end, States Parties shall take appropriate measures, including:
- (a) Facilitating the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring;
 - (b) Facilitating the learning of sign language and the promotion of the linguistic identity of the deaf community;
 - (c) Ensuring that the education of persons, and in particular children, who are blind, deaf or deafblind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development.
4. In order to help ensure the realization of this right, States Parties shall take appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train professionals and staff who work at all levels of education. Such training shall incorporate disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities.
5. States Parties shall ensure that persons with disabilities are able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others. To this end, States Parties shall ensure that reasonable accommodation is provided to persons with disabilities.

It was noted above that the right to education in the foundational UDHR had six elements to it. The language of the CRPD can be analysed similarly. First, it

repeats that there is a right to education (ie not a privilege); secondly, it covers all stages, including tertiary and ongoing education. The third point set out above, namely that it is a right for everyone, is given particular prominence, not surprisingly so in the context of a convention that focuses on the right to inclusion of persons with disabilities. Hence the references to the need for access without discrimination, on the basis of equality of opportunity and the like. There are also a series of more specific steps that should be taken in this regard, reflecting the value of specialist treaties that can make express what is implicit in the general requirement as to non-discrimination. The various specifics listed in the article amount to a requirement for an inclusive process of educating all in the same educational system. Accordingly, not only must there be no exclusion from education based on disability but the school system has to be operated on the basis of an inclusive process. Moreover, there must be various steps taken to ensure that persons with disabilities are able to participate in this inclusive education: this involves the provision of suitable environments (and hence thought about the built environment), the provision of suitable supports (and hence thought about staffing and augmentations of teaching equipment and materials), and the use of reasonable accommodation (and hence thought about the need for flexibility of provision based on individual need).

The concern about the built environment means that there must be engagement with planners, architects, designers and engineers.⁽¹⁵⁾ A core concept behind the CRPD is worth noting here, namely universal design, the idea that things should be usable by as many people as possible: this will reduce the need for reasonable accommodation, namely the making of such modifications which are needed to ensure that the person with disabilities can enjoy the same situation as others and which do not impose a disproportionate or undue burden (Article 2). The promotion of universal design is an obligation undertaken under Article 4 of the CRPD, and it covers “products, environments, programmes and services” (according to its definition in Article 2); as such, it also operates as something within curriculum and pedagogy design. The failure to make reasonable accommodation is within the definition of discrimination on the basis of disability (in Article 2), which must be avoided by reason of the various terms of the CRPD. The terms of Articles 24(3) and (4) can be seen as instances of what these principles require: teaching students the skills that will assist them to communicate and participate, and ensuring that those who work in education have the relevant awareness of disability rights and that there are sufficient staff

(15) There is discussion in the text below as to the right to accessibility, guaranteed in Article 9 of the CRPD.

members who can use the relevant alternative methods of communication.

The combination of inclusive education principles, informed by universal design and, where necessary, reasonable accommodation, should provide a situation whereby just about all children can attend the same schooling as their colleagues without disabilities: it will only be when universal design plus any accommodation is disproportionately or unduly burdensome that this will not occur. In terms of the costs of education, Article 24(2)(b) refers to both primary and secondary education being free, which suggests that reasonable accommodation cannot be something that has to be provided only if it is paid for by the parents or guardians of a child with disabilities.

The fourth element noted above in relation to the UDHR and ICESCR relates to the involvement of parents in choosing education for their children; this is not mentioned in the CRPD expressly. There is in Article 23 a requirement for equal respect for the family and home life of both parents and children with disabilities and so it will be a matter of interpretation as to whether this fourth element is to be found there or whether its omission is a deliberate decision to focus on the rights of the person being educated. It is certainly the case that the Committee on the Rights of Persons with Disabilities has a focus on the rights of the learner, commenting that it is “not, in the case of children, the right of a parent or caregiver”.⁽¹⁶⁾

The fifth element, namely the purpose to which education is aimed, is covered on some detail in Article 24(1), which covers education at all levels, including tertiary and life-long learning. As in the more general documents, the focus is on both societal benefit – “the strengthening of respect for human rights, fundamental freedoms and human diversity” – and benefits for individuals, including those individuals with disabilities who had not necessarily benefitted from the focus on individual benefit in the other human rights documents. Hence, three specific purposes are noted for education. The first, the “full development of human potential and sense of dignity and self-worth”, is not expressly limited to persons with disabilities; the second and third, which are so limited, refer to developing the fullest potential of “personality, talents and creativity, as well as ... mental and physical abilities” and to effective participation in society. Article 24(3) supplements this by reference to particular “life and social development skills” that will assist involvement in both the

(16) Committee on the Rights of Persons with Disabilities *General Comment No 4 on the right to inclusive education*, CRPD/C/GC/4, 25 November 2016, [10].

process of education and the community, including a variety of methods of communication, peer support and mentoring: the latter naturally also requires suitably skilled teachers, to which reference is made in Article 24(4).

The sixth feature of the more general UDHR and ICESCR is the differentiation that is permissible in relation to admission to tertiary education. In the CRPD, the reference made in Article 24(5) is somewhat different: rather than stating anything about the standards for admission to tertiary education in general, the point made is that persons with disabilities should have equal access, and there is the reminder that this entails reasonable accommodation.

C. Expanding on the Content of the Right to Education, including the Right to Tertiary Education and Applying Non-Discrimination Principles to It

It is clear from the elements discussed above that the right to education covers tertiary education: the UDHR and the ICESCR refer to higher education and the CRPD refers to tertiary education. Moreover, the natural corollary of various purposes noted of the rationale for the right mean that it must extend to tertiary level provision: reference in Article 24(1) CRPD to the “full development of human potential” and to securing “to their fullest potential” the development of various attributes of persons with disabilities, namely “their personality, talents and creativity, as well as their mental and physical abilities”, may necessitate tertiary education.

The material set out above as to the right to education is necessarily at a high level, that being the style of human rights declarations and treaties. More detail is provided in a variety of ways. For example, supplemental treaties may be drafted (of which the CRPD is an example in relation to what is required by non-discrimination principles). In the field of education more specifically, predating the ICESCR was the Convention against Discrimination in Education 1960,⁽¹⁷⁾ promulgated by the United Nations Educational, Scientific and Cultural Organisation. It requires states to take action to combat discrimination in education (Article 3), which it defines to include features which are based on various matters of status (“race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth” – but without any catch-all such as “other status”) and have the purpose or effect of undermining “equality of treatment in education” (Article 1). Specific examples of what is

(17) There is also a Recommendation against Discrimination in Education, adopted at the same time. They are available at <https://en.unesco.org/>: see also Y Daudet and PM Eisemann, Right to education: commentary on the Convention against Discrimination in Education, UNESCO 2005.

not permitted are given, including limiting access to any form of education (which could include at tertiary level) and “establishing or maintaining separate educational systems or institutions for persons or groups of persons” (though with express permission given in Article 2 for single sex schools and schools that are based on religious or linguistic differences, and also private education).

1. The Views of the Committee on Economic, Social and Cultural Rights

In addition to supplemental treaties, UN human rights treaties fall under the remit of a body of experts whose role is to supervise efforts to implement the treaty’s standards and also to explain further the normative content of the rights enunciated. In relation to the ICESCR, the relevant treaty body is the Committee on Economic, Social and Cultural Rights. It has expanded upon the content of the right to education in its *General Comment No 13: the Right to Education*.⁽¹⁸⁾ Importantly, the Committee opens with a strong comment on the right to education as both a free-standing right and one of great instrumental value, both in terms of its practical utility and its role in human fulfilment: it is an “empowerment right” that can secure various positive outcomes – examples being avoiding poverty and exploitation, protecting the environment, promoting other rights and democracy – such that it is seen as “one of the best financial investments States can make”; but it also provides “one of the joys and rewards of human existence”, namely “a well-educated, enlightened and active mind, able to wander freely and widely”.⁽¹⁹⁾

The Committee phrases the right as “the right to receive an education”.⁽²⁰⁾ This emphasises the importance of access to education, which is reflected in the various components of the right: availability (of sufficient educational institutions), accessibility (meaning that it must be economically affordable, physically accessible in that it is local or available via distance learning, and does not involve discrimination), acceptability (namely having suitable standards) and adaptability (to changing and different needs).⁽²¹⁾ On the non-

(18) Committee on Economic, Social and Cultural Rights *General Comment No 13: the Right to Education*, E/C.12/1999/10, 8 December 1999.

(19) Committee on Economic, Social and Cultural Rights *General Comment No 13: the Right to Education*, E/C.12/1999/10, 8 December 1999, [1].

(20) Committee on Economic, Social and Cultural Rights *General Comment No 13: the Right to Education*, E/C.12/1999/10, 8 December 1999, [6].

(21) Committee on Economic, Social and Cultural Rights *General Comment No 13: the Right to Education*, E/C.12/1999/10, 8 December 1999, [6]: in terms of the affordability requirement, there is a note about the need for primary education to be free and for secondary and tertiary education to become free progressively.

discrimination aspects of education, the Committee notes the need to take account of other relevant documents, including the UNESCO Convention against Discrimination in Education and other UN Human Rights Treaties designed to counter discrimination.⁽²²⁾

In relation to persons with disabilities, it expressly endorses comments made in its General Comment No 5: Persons with Disabilities.⁽²³⁾ In this latter document, there is endorsement of equality of opportunity in education via integration into the mainstream with the relevant supplemental support,⁽²⁴⁾ citing the Standard Rules on the Equalization of Opportunities for Persons with Disabilities.⁽²⁵⁾ The Standard Rules, endorsed by the UN General Assembly in December 1993, make various references to the instrumental value of education: and in terms of education itself, Rule 6 endorses integrated education together with adequate accessibility and other supports,

(22) The Committee refers to the right to education in article 29 of the Convention on the Rights of the Child, but also the World Conference on Education for All: Meeting Basic Learning Needs, World Declaration on Education for All and Framework for Action to Meet Basic Learning Needs ('World Declaration on Education for All'), Jomtien, Thailand, 5–9 March 1990, and more often referred to as the Jomtien Declaration, available at <https://unesdoc.unesco.org/ark:/48223/pf0000127583>; the Vienna Declaration and Programme of Action of 25 June 1993, the outcome of the World Conference on Human Rights, which was designed to prompt further progress towards achieving human rights standards more generally and included a specific reference (part 1, paragraph 33) to the role of the right to education in promoting respect for human rights; and the Plan of Action for the United Nations Decade for Human Rights Education, which followed from the Vienna Declaration, the United Nations General Assembly passing Resolution 49/184, of 23 December 1994, which set the decade 1 January 1995 to 31 December 2004 as the United Nations Decade for Human Rights Education. The Jomtien Declaration, has been reaffirmed in the World Education Forum, The Dakar Framework for Action: Education for All: Meeting Our Collective Commitments, Dakar, Senegal, 26–8 April 2000 (Dakar Framework for Action 2000). These set out programmes designed to secure the progressive realisation of the right to education. In turn, it has been supplemented by the Muscat Agreement of 2014 (UNESCO, The GEM Final Statement – The Muscat Agreement, outcome of the Global Education for All Meeting, Muscat, Oman, 12-14 May 2014), available at <https://unesdoc.unesco.org/ark:/48223/pf0000228122>, and the Incheon Declaration (UNESCO, Education 2030 – Incheon Declaration and Framework for Action, available at <http://en.unesco.org/education2030-sdg4>), which is designed specifically to implement the UN Sustainable Development Goal No 4, relating to inclusive and quality education for all. See also World Conference on Special Needs Education: Access and Quality, Salamanca, Spain, 7-10 June 1994 (The Salamanca Statement and Framework for Action on Special Needs Education), available at http://www.unesco.org/education/pdf/SALAMA_E.PDF.

(23) Committee on Economic, Social and Cultural Rights *General Comment No 13: the Right to Education*, E/C.12/1999/10, 8 December 1999, [31]-[37]; Committee on Economic, Social and Cultural Rights *General Comment No 5: Persons with disabilities*, 1994.

(24) Committee on Economic, Social and Cultural Rights *General Comment No 5: Persons with disabilities*, 1994, [35].

(25) A/RES/48/96.

and flexibility in the curriculum.⁽²⁶⁾ One can therefore trace back to the late 20th Century the endorsement of the United Nations that inclusive principles should be the governing approach to education.⁽²⁷⁾

There is relatively little comment in relation to tertiary education.⁽²⁸⁾ This is understandable, given the need to prioritise action in relation to education for all (which of course will increase the pool for those who might undertake tertiary study). However, the Committee notes the importance of higher education responding to the different social and cultural settings of students, which mandates “flexible curricula and varied delivery systems, such as distance learning”; and that technical and vocational education is to be available at the tertiary as well as secondary level.⁽²⁹⁾ It also notes the need for this to be subject to the expansion of free education.⁽³⁰⁾

However, it is accepted that access to tertiary education may be subject to limitations that do not apply at earlier stages, given that Article 13 of the ICCPR refers to “capacity” to undertake higher education, which is not a criterion for primary or secondary education. Hence it is accepted that there is a differentiation in terms of tertiary education not having to be available for all. The Committee notes that potential students “should be assessed by reference to all their relevant expertise and experience”.⁽³¹⁾ This does not engage with the purpose of higher education and hence the qualities to which that capacity should be aimed. Rather, there is

(26) There is also an acceptance that special education may be considered, but that is if the state has not met the integration standards. Further, it is accepted that the communication needs of persons who are deaf and deaf/blind may need to be in special schools or special units in mainstream schools.

(27) For a short history of the move towards inclusion, see Office of the High Commissioner for Human Rights, *Thematic study on the right of persons with disabilities to education*, A/HRC/25/29, 18 December 2013, [6].

(28) This is reflected in B Saul, D Kinley and J Mowbray *The International Covenant on Economic, Social and Cultural Rights* (OUP, Oxford, 2014). In the context of a 77-page chapter on the right to education, just over one page (at 1104-1105) is devoted to the question of “higher education”, there is brief mention (at 1114) of concerns mentioned about tuition fees causing discriminatory access to education on the basis of economic circumstances, and a one-page discussion (at 1148-1149) of academic freedom as an issue arising most often in the tertiary context.

(29) Committee on Economic, Social and Cultural Rights *General Comment No 13: the Right to Education*, E/C.12/1999/10, 8 December 1999, [17]-[18].

(30) Committee on Economic, Social and Cultural Rights *General Comment No 13: the Right to Education*, E/C.12/1999/10, 8 December 1999, [20].

(31) Committee on Economic, Social and Cultural Rights *General Comment No 13: the Right to Education*, E/C.12/1999/10, 8 December 1999, [19].

an assumption that it will be accessible by some only on a merits basis. Nonetheless, there is an endorsement of access to tertiary education being covered by the rights framework and being subject to non-discrimination principles, and of it being subject to the inclusivity of education approach.

2. The Views of the Committee on the Rights of Persons with Disabilities

(a) Endorsing Inclusive Education as an Immediate Obligation

The drafters of the CRPD naturally took up this mantle of supporting inclusive education:⁽³²⁾ as the Committee on the Rights of Persons with Disabilities – the relevant expert treaty body⁽³³⁾ - noted in its *General Comment No 4 on the right to inclusive education*:

Recognition of inclusion as the key to achieving the right to education has strengthened over the past 30 years and is enshrined in the Convention on the Rights of Persons with Disabilities, the first legally binding instrument to contain a reference to the concept of quality inclusive education.⁽³⁴⁾

(32) This is not without its critics. D Anastasiou, M Gregory and JM Kauffman comment that the CRPD reflects a change in focus from a needs-based approach to an anti-discrimination approach based on equal access and having the same education, but analyse this as follows: “the anti-discrimination paradigm’s dual focus on equal access and sameness of treatment result in article 24’s over-emphasis on inclusive education as the primary (or even the exclusive) vehicle for realizing the right to education for PWD. More specifically, article 24 tends to elevate the education of PWD in mainstream educational environments as its presumed substantive standard rather than the provision of quality instruction in an appropriate setting (including specialized settings) tailored to the particular educational needs of each individual student”: D Anastasiou, M Gregory and JM Kauffman ‘Art 24 Education’ in I Bantekas, MA Stein and D Anastasiou (Eds) *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (OUP, Oxford, 2018).

(33) It is established under Article 34 of the CRPD to consider reports from states as to the progress in their obligations to put the Convention into effect (Articles 35 and 36), report to the UN and make suggestions and recommendations (Article 39), and, in relation to states that have signed the Optional Protocol (Optional Protocol to the Convention on the Rights of Persons with Disabilities 2006 2518 UNTS 283 (opened for signature 13 December 2006, entered into force 3 May 2008), considering complaints or undertaking inquiries under that instrument.

(34) Committee on the Rights of Persons with Disabilities *General Comment No 4 on the right to inclusive education*, CRPD/C/GC/4, 25 November 2016, [2]. It endorsed the views of the Office of the High Commissioner for Human Rights, which concluded that “Inclusive education is essential to achieving universality of the right to education, including for persons with disabilities. Only inclusive education systems can provide both quality of education and social development for persons with disabilities”: Office of the High Commissioner for Human Rights, *Thematic study on the right of persons with disabilities to education*, A/HRC/25/29, 18 December 2013, [68].

The Committee recorded that achieving this “entails a transformation in culture, policy and practice”,⁽³⁵⁾ based on a series of features it identifies and describes.⁽³⁶⁾ These include a “whole systems” approach (led by education ministries ensuring that resources are placed accordingly and cultures changed), a “whole educational environment” (namely the commitment of those involved in educational institutions to promote the inclusive approach), and a “whole person approach” (which sets high expectations of all students, rests on flexibility as to the needs of the students, including relevant support); this is supplemented by matters such as the training of teachers and other staff, a culture of valuing diversity, processes to ensure effective transitions between different stages in the learning journey, and monitoring and evaluation.⁽³⁷⁾

An important question arises about how this interacts with the fact that the right to education is an economic, social and cultural right and hence it has to be implemented over time, progressively with the maximum of available resources being used. This is reflected also in relation to the CRPD: Article 4 sets out the general obligations of states to counter discrimination on the basis of disability, whether by public bodies or those in the private sector, including in relation to such rights the progressive realisation obligation but making use of the maximum of available resources as part of that. Whilst the transformation in culture noted above is inevitably something that involves resources, it should be recalled that the non-discrimination aspect is in the nature of a civil and political right and so not resource dependent.

The Committee is realistic in this regard, suggesting that a state needs to recognise that Article 24 “is not compatible with sustaining ... a mainstream education system and a special/segregated education system”, such that the Article 4 obligation as to progressive realisation does not undermine the need for clear steps.⁽³⁸⁾ This may mean transferring budgets to inclusive education. It also

(35) Committee on the Rights of Persons with Disabilities *General Comment No 4 on the right to inclusive education*, CRPD/C/GC/4, 25 November 2016, [9]. See also Office of the High Commissioner for Human Rights, *Thematic study on the right of persons with disabilities to education*, A/HRC/25/29, 18 December 2013, [7].

(36) There is no definition of “inclusive education” in the CRPD: hence the Committee is exercising its function of elucidation.

(37) Committee on the Rights of Persons with Disabilities *General Comment No 4 on the right to inclusive education*, CRPD/C/GC/4, 25 November 2016, [12].

(38) Committee on the Rights of Persons with Disabilities *General Comment No 4 on the right to inclusive education*, CRPD/C/GC/4, 25 November 2016, [40].

means that obligations which are “immediately applicable” cannot be deferred.⁽³⁹⁾ Amongst the “core rights” that are to be implemented “with immediate effect” are:

- (a) Non-discrimination in all aspects of education and encompassing all internationally prohibited grounds of discrimination. States parties must ensure non-exclusion from education for persons with disabilities and eliminate structural disadvantages to achieve effective participation and equality for all persons with disabilities. They must urgently take steps to remove all legal, administrative and other forms of discrimination impeding the right of access to inclusive education. The adoption of affirmative action measures does not constitute a violation of the right to non-discrimination with regard to education, so long as such measures do not lead to the maintenance of unequal or separate standards for different groups;
- (b) Reasonable accommodations to ensure non-exclusion from education for persons with disabilities. Failure to provide reasonable accommodation constitutes discrimination on the ground of disability; ...⁽⁴⁰⁾

The nature of what can be done immediately reflects the taxonomy adopted of whether the obligation of the state is to respect, protect or fulfil the particular right in question.⁽⁴¹⁾ Respecting a right means not hindering it by matters such as discriminatory legislation (including in this legislation that fails to require reasonable accommodation); protecting it involves preventing private persons or organisations breaching a right; and fulfilling a right involves steps that assist the realisation of the right, such as by ensuring the physical accessibility of institutions and the provision of relevant resources. The latter may require resources, and so be caught by the progressive realisation obligation; however, respecting and protecting rights has some elements that are not resource-dependent, such as the passing of relevant legislation to ensure that there is no discrimination by public or private actors. The fact that private actors have to be bound, which is most obviously done by relevant legislation, is a core feature of

(39) Committee on the Rights of Persons with Disabilities *General Comment No 4 on the right to inclusive education*, CRPD/C/GC/4, 25 November 2016, [41].

(40) Committee on the Rights of Persons with Disabilities *General Comment No 4 on the right to inclusive education*, CRPD/C/GC/4, 25 November 2016, [41]. Reference is made also to the need to ensure that all children with disabilities can access free education for 12 years, with at least 9 years being compulsory; at [42], reference is made to the need to have a national strategy based on inclusive education.

(41) Committee on the Rights of Persons with Disabilities *General Comment No 4 on the right to inclusive education*, CRPD/C/GC/4, 25 November 2016, [39].

the obligations undertaken: hence, Article 4(2)(e) indicates that states must “take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise”. However, some aspects of protecting rights will require steps such as monitoring and enforcement mechanisms that may have resource implications and so be achievable in a time-scale dependent on what the maximum of available resources requires.

One of the immediately applicable obligations noted as a core one is that of reasonable accommodation. This, however, is phrased in a way that suggests resource dependency in that it involves the obligation to make changes that are not disproportionate or unduly burdensome, which is a reference to resources. However, this obligation applies to both the public and private sector: accordingly, legislation is required to oblige the making of reasonable accommodation by both sectors. For those in the public sector, the state obligation to use the maximum of available resources will no doubt inform what has to be done in terms of whether an accommodation is unduly burdensome. However, the reminder of the Committee that there is the obligation to make reasonable accommodation as a core feature that has to be implemented immediately ensures that resources have to be provided to do what is not unduly burdensome, given that the absence of reasonable accommodation is discrimination on the grounds of disability.

(b) The Limited Comment on Tertiary Education – Reviewing That in Context

Again, there is relatively limited comment made on tertiary education,⁽⁴²⁾ but reasonable accommodation does feature. The Committee on the Rights of Persons with Disabilities explains Article 24(5) in the following terms:

38. To give effect to article 24 (5), States parties should ensure that persons with disabilities are able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others. Attitudinal, physical,

(42) Accordingly, in V Della Fina, R Cera and G Palmisano (Eds) *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Springer, Cham, Switzerland, 2017), Della Fina’s chapter on Article 24 has two pages on Article 24(5), at pp456-458, but this deals also with vocational, adult education and lifelong learning as well as university education. Similarly, in I Bantekas, MA Stein and D Anastasiou (Eds) *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (OUP, Oxford, 2018), D Anastasiou, M Gregory and JM Kauffman provide a detailed review of Article 24: of university education, their commentary is limited to two pages (at 703-704) that also consider vocational, adult and lifelong learning.

linguistic, communication, financial, legal and other barriers to education at these levels must be identified and removed in order to ensure equal access. Reasonable accommodation must be provided to ensure that persons with disabilities do not face discrimination. States parties should consider taking affirmative action measures in tertiary education in favour of learners with disabilities.

There are three essential components to this: first, the right of access on an equal basis must be guaranteed, which means tackling barriers to that; secondly, a reminder that equality actually means that more must be provided in the form of reasonable accommodation; thirdly, that affirmative action is to be considered. To understand the implications of these points, it is appropriate to consider further what amounts to disability discrimination, that being the problem against which action has to be taken.

The preamble to the CRPD notes that the parties to it are “[c]oncerned that ... persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world” despite all the provisions requiring equality.⁽⁴³⁾ As has been noted in Part I, there is no complete definition, save the indication that some conditions are clearly covered, namely “long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others” – CRPD Article 1; rather, there is the indication that it is an “evolving concept” involving “attitudinal and environmental barriers” to full and equal societal participation” – CRPD preamble (e). The attitudinal problem was summarised by the authors of a Handbook for Parliamentarians on the Convention as follows:⁽⁴⁴⁾

Persons with disabilities are still primarily viewed as “objects” of welfare or medical treatment rather than “holders” of rights. The decision to add

(43) Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 December 2006, entered into force 3 May 2008) [CRPD], preamble paragraph (k).

(44) A Handbook for Parliamentarians on the Convention, *From Exclusion to Equality, Realizing the rights of persons with disabilities*, issued by the High Commissioner for Human Rights, the Department of Economic and Social Affairs of the UN, and the Inter-Parliamentary Union (available at <https://www.un.org/development/desa/disabilities/resources/handbook-for-parliamentarians-on-the-convention-on-the-rights-of-persons-with-disabilities.html>, last accessed 8 April 2019), p4. It is also noted that “Persons with disabilities remain amongst the most marginalized in every society. While the international human rights framework has changed lives everywhere, persons with disabilities have not reaped the same benefits” (Foreword, piii).

a universal human rights instrument specific to persons with disabilities was borne of the fact that, despite being theoretically entitled to all human rights, persons with disabilities are still, in practice, denied those basic rights and fundamental freedoms that most people take for granted.

This explains the opening language of Article 1 of the CRPD, its purpose clause: “The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity”. This does not refer to any new rights being provided. As the authors of the Handbook state:⁽⁴⁵⁾

The Convention is a complement to existing international human rights treaties. It does not recognize any new human rights of persons with disabilities, but rather clarifies the obligations and legal duties of States to respect and ensure the equal enjoyment of all human rights by all persons with disabilities.

Despite this suggestion that there are no new rights, the aim of the CRPD should not be understated. Hence, as Harpur has commented:⁽⁴⁶⁾

... the CRPD does not merely re-state existing human rights. The CRPD re-states existing rights and then creates incidental rights to ensure that existing rights are realized. Through this process existing rights are provided greater clarity, which provides disability advocates and scholars with a powerful tool to hold states accountable.

In short, whilst there is no new higher level right (such the right to education is one that has always been there for persons with disabilities), the implications of the right are stated more clearly, with a specificity in terms of the ancillary rights that are implied as part of the main right in the wider rights document and made express in the more particularised CRPD. But if the greater clarity to which Harpur refers amounts to a changed understanding of what a right requires, it may be understating the value of the CRPD to assert that it does not involve new rights. A new conception of right that differs from previous assumptions as to its content is more akin to a new right. Indeed, it has been stated by the Committee on the Rights of Persons with Disabilities that the

(45) *From Exclusion to Equality, Realizing the rights of persons with disabilities*, above n XXX, p5.

(46) Paul Harpur “Embracing the new disability rights paradigm: the importance of the Convention on the Rights of Persons with Disabilities” (2012) 27:1 *Disability and Society* 1, 2.

CRPD represents a new paradigm.⁽⁴⁷⁾ Accordingly, the Committee has said of Slovakia that it “welcomes the recognition of the paradigm shift required to realize the rights of persons with disabilities in the State party as well as the efforts to adopt a human rights-based approach to disability”.⁽⁴⁸⁾ Less positively, it was said in relation to Belgium’s failure to take the necessary steps to comply with its obligation to raise awareness of the positive contributions to society of persons with disabilities and to counter stereotypes (required by Article 8) that “The Committee is concerned that there is no sign that a paradigm shift has occurred following ratification of the Convention, whereby persons with disabilities are recognized as basic rights holders taking part in decisions affecting them and asserting their rights in society”.⁽⁴⁹⁾ Similarly, in relation to Cyprus and its failure to comply with the obligation that those whose mental capacity to make or communicate a decision is compromised should be supported in making their own decision rather than having a decision made on their behalf (a move away from such substituted decision-making to supported decision-making being required by Article 12), it was suggested that Cyprus should “Allocate adequate human, technical and financial resources to support the transformation from the present paradigm to a new paradigm that is in line with the Convention ...”.⁽⁵⁰⁾

The basic obligation on states, set out in Article 4, is to “ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability”. As has been set out in Part I, the problem is made out by measures that have the “purpose *or effect*” of undermining equal enjoyment of rights by persons with disabilities, including “*denial of reasonable accommodation*”. These two emphasised terms mean that, first, the concern is not just with the

(47) Paradigm shifts are those that involve a new way of thinking that may demonstrate that previous conceptions were inaccurate. This idea is credited to Thomas S Kuhn *The Structure of Scientific Revolutions* (University of Chicago Press, Chicago, 1962. See Kristin Booth Glen, “Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond” (2012) 44 *Columbia Human Rights Law Review* 93, 96-99. As an example, Glen, writing in the context of guardianship, notes that the view of people with limited capacity being treated as objects of charity and placed under guardianship in their best interests was being replaced by a supported decision-making approach, an “emerging paradigm” which “challenges our perceptions and our understanding of when, how, and even *if* the state may intervene in a person’s life”, moving society from its comfort zone to a new way of thinking (at 98).

(48) Concluding Observations on Slovakia UN Doc CRPD/C/SVK/CO/1 (17 May 2016), para 4, under the heading “Positive aspects”.

(49) Concluding Observations on Belgium UN Doc CRPD/C/BEL/CO/1 (28 October 2014), para 17.

(50) Concluding Observations on Cyprus UN Doc CRPD/C/CYP/CO/1 (8 May 2017), para 34(b).

purpose behind a particular law, policy or practice: the effect of something which on its face may be neutral has to be considered.⁽⁵¹⁾ Secondly, acting neutrally towards a person with a disability is problematic because that fails to take into account the fact that the level playing field may often require that more be provided, reasonable accommodation being those modifications needed to allow the equal enjoyment of rights and which do not involve a “disproportionate or undue burden” – Article 2.

Having set out the problem in respect of which action is needed (preamble), the purpose of the Convention (Article 1) and the core definitions (Article 2), the drafters of the Convention have then set out in Article 3 the general principles guiding the Convention, which will condition the steps that have to be taken:

- (a) Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons;
- (b) Non-discrimination;
- (c) Full and effective participation and inclusion in society;
- (d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- (e) Equality of opportunity;
- (f) Accessibility;
- (g) Equality between men and women;
- (h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

(51) This is a common feature of the anti-discrimination treaties of the UN: Article 1(1) of ICERD provides that “1. In this Convention, the term “racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”. Similarly, Article 1 of CEDAW provides that “For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”. The importance of the effect of something is one reason why there is Article 31 in the CRPD, which requires statistics and data to be collected, since that is an obvious way to secure information about whether something needs to be changed light of its effect.

What states have to do is then set out in Article 4(1). Most generally, the state must “adopt all legislative, administrative and other measures” to implement the Convention (Article 4(1)(a)). This is then broken down into various aspects of governmental functions, involving both law making, enforcement, policy formulation and encouragement of others. Accordingly, the traditional state actions of legislation and enforcement are referenced: it is necessary for the state to take “all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities” (Article 4(1)(b)), ensure that all public bodies comply with the CRPD, by not breaching it and by taking the relevant positive steps required (Article 4(1)(d)), and the private sector, whether a person, organisation or enterprise, has to be regulated through “all appropriate measures” to prevent discrimination on the basis of disability (Article 4(1)(e)).⁽⁵²⁾ Given that the central problem identified in the CRPD is attitudinal barriers, it is understandable that it is not sufficient for these traditional areas of state action to be used, but wider steps are required. Accordingly, it is also necessary for the state to mainstream consideration of matters of disability by ensuring that the rights of persons with disabilities are taking into account “in all policies and programmes” (Article 4(1)(c)), promote “universally designed goods, services, equipment and facilities” (Article 4(1)(f)), promote research and development of new assistive technologies (Article 4(1)(g))⁽⁵³⁾ and of information on technologies and support services in an accessible style (Article 4(1)(h)). Finally, there is reference to the state duty to promote the training of those who work with people with disabilities as to what their rights entail (Article 4(1)(i)). In addition, and reflecting the obvious fact that people with disabilities are most attuned to what affects them and what might work to secure better outcomes, Article 4(3) requires the involvement of persons with disabilities in the formulation of legislation and policy.

Reading the comments of the Committee on the Rights of Persons with Disabilities as to the content of the right to tertiary education in light of these

(52) The concept in international human rights law is of “horizontal effect”: even if human rights obligations apply only to states and not to private actors, the fact is that breaches of rights may occur as the result of the actions of private persons or bodies. If this is the result of the state failing to regulate the situation so as to safeguard rights, the breach may found state responsibility. Naturally, there may be many ways for a state to seek to control: in addition to regulation and enforcement, situations involving state funding of private bodies may be conditioned on appropriate obligations being undertaken by the private body, for example.

(53) Note that the definition of Universal Design in Article 2, partly set out in the text above, adds that “«Universal design» shall not exclude assistive devices for particular groups of persons with disabilities where this is needed”.

general obligations arising under the CRPD, the first element, namely the tackling of barriers to access, means that decisions in the tertiary education sector, including such matters as admissions policies, curriculum design, and teaching and assessment processes, have to be designed in a way that do not have the effect of disadvantaging persons with disabilities. This may also necessitate the education of the personnel involved, both teaching and support staff. Naturally, matters such as the design of teaching facilities and even questions such as the location of tertiary institutions may have to be considered. Secondly, it is necessary to make sure that all decisions are assisted by the use of reasonable accommodation to ensure that any disadvantage caused by disability is countered where that would not be disproportionate or unduly burdensome. Thirdly, a specific process of affirmative action should be considered: this reflects the indication in Article 5(4) of the CRPD that “Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention”. In short, the disadvantage caused by discrimination in the past, which has no doubt resulted in the under-representation of persons with disabilities in tertiary education, might properly be countered by not just making sure that there is no ongoing disadvantage, but an attempt to produce equality more quickly.

(c) Concluding Observations as a Source of Further Guidance on the Right to Education

The General Comment has been supplemented by a variety of specific comments made to countries in their reports to the Committee on the steps they have been taking. These can be grouped according to issues on which comment was made (although, as is made clear in the discussion, the borders between the different groups do not necessarily involve bright-line distinctions. As a precursor, there was occasionally a deficit in information. Accordingly, in the case of the United Arab Emirates, there was a request that information be provided in its next report about opportunities to access tertiary education.⁽⁵⁴⁾ A second precursor setting was a situation in which the Committee identified a problem but did not actually recommend expressly a particular solution. In relation to Qatar, although the Committee expressed its concern about “the lack of opportunities to access ... tertiary education”, it did not make a specific recommendation in this regard: it did, however, suggest that “the Supreme Education Council is responsible for coordinating the availability

(54) Concluding Observations on the UAE UN Doc CRPD/C/ARE/CO/1 (3 October 2016), para 44(e).

of appropriate lifelong learning environments for persons with disabilities”.⁽⁵⁵⁾ Accordingly, the proposed solution may be implicit. Bosnia and Herzegovina can also be referred to in this connection, as there was no recommendation made in relation to a general problem of accessibility at the tertiary level, there was a reference to a particular step to be taken (and so it is included in the second group below).

In the first group, there were a number of statements which simply recorded the need for greater levels of enrolment, sometimes referring to all levels of education and sometimes referring expressly to tertiary education, sometimes with a reference being made to an identified deficit and sometimes not. Examples are as follows:

- (i) New Zealand was encouraged “to increase the levels of entry into tertiary education for persons with disabilities”.⁽⁵⁶⁾
- (ii) Croatia: although there was no specific mention of concerns relating to tertiary education, the state was recommended to “take immediate steps to ensure that all persons with disabilities have access to inclusive quality primary, secondary and tertiary education...”.⁽⁵⁷⁾
- (iii) Moldova: although no specific concerns relating to tertiary education were raised, the Committee commented that the state should “... ensure accessibility and allocate the resources necessary to guarantee reasonable accommodation to facilitate the access of students with disabilities to quality, inclusive education, including pre-school and tertiary education...”.⁽⁵⁸⁾
- (iv) Armenia: although no specific concerns relating to tertiary education were mentioned, the Committee set forth a recommendation that the state “Ensure accessibility and allocate the resources necessary to guarantee reasonable accommodation to facilitate the access of persons with disabilities, including those living in urban and rural areas, to inclusive and quality education, including preschool and tertiary education ...”.⁽⁵⁹⁾
- (v) Sudan: concern was expressed about “The limited support for

(55) Concluding Observations on Qatar UN Doc CRPD/C/QAT/CO/1 (2 October 2015), paras 43 and 44.

(56) Concluding Observations on New Zealand UN Doc CRPD/C/NZL/CO/1 (31 October 2014), para 50.

(57) Concluding Observations on Croatia UN Doc CRPD/C/HRV/CO/1 (15 May 2015), para 36.

(58) Concluding Observations on Moldova UN Doc CRPD/MDA/CO/1 (18 May 2017), para 45(a).

(59) Concluding Observations on Armenia UN Doc CRPD/ARM/CO/1 (8 May 2017), para 42(b).

learners with disabilities, including in the areas of vocational training and tertiary education”. The recommendation made was that the state “Take measures to establish an inclusive education system at all levels, to include preschool, primary, secondary and tertiary education and vocational training, without discrimination and on an equal basis with others ...”.⁽⁶⁰⁾

- (vi) The Philippines: although no specific concern was noted, it was recommended that the state “Take legislative and administrative measures to ensure the availability of accessible learning materials at the technical and higher education levels for persons with disabilities” and “ensure equal access to all levels of education and vocational training”.⁽⁶¹⁾

A second grouping of observations made a more specific reference to a problem of low numbers of students in tertiary education, and so recommendations made were more than just repeating of the general desirability of inclusive education at all levels. Comments were made about specific features to tackle the problem:

- (i) Hong Kong: the Committee recorded that it was “troubled by the low number of students with disability in tertiary education, due to lack of a coherent education policy” and recommended that Hong Kong and China “provide sufficient resources to ensure the accessibility in tertiary education”.⁽⁶²⁾
- (ii) Macau: the Committee was also concerned about the low numbers and called on the state “to continue making tertiary education more accessible to students with disabilities”.⁽⁶³⁾
- (iii) Austria: the country was commended for offering sign language at the tertiary level, but this was countered by the concern as to the limited enrolments by students with hearing impairments, meaning that the Committee recommended “that greater efforts be made to enable persons with disabilities to study at universities and other tertiary institutions”.⁽⁶⁴⁾

(60) Concluding Observations on Sudan UN Doc CRPD/C/SDN/CO/1 (10 April 2018), paras 47 and 48.

(61) Concluding Observations on The Philippines UN Doc CRPD/C/PHL/CO/1 (16 October 2018), para 41.

(62) Concluding Observations on China UN Doc CRPD/C/CHN/CO/1 (15 October 2012), paras 73 and 74.

(63) Concluding Observations on China UN Doc CRPD/C/CHN/CO/1 (15 October 2012), paras 94 and 95.

(64) Concluding Observations on Austria UN Doc CRPD/C/AUT/CO/1 (30 September 2013), paras 41 and 43.

- (iv) Ecuador: the Committee indicated its concern that “few persons with disabilities have access to State universities, which have not yet adjusted their curriculum and made their main facilities accessible so that persons with disabilities can enrol in their various courses”; and recommended that the state “Step up efforts to implement models of inclusive education for persons with disabilities at the university level by encouraging adaptations to the curriculum and premises of universities for the various courses they offer”.⁽⁶⁵⁾
- (v) Lithuania: it was noted with concern that “the rate of enrolment of persons with disabilities in tertiary education is low” and accordingly it was recommended that the state “facilitate access for persons with disabilities to tertiary education and vocational training, including through the provision of reasonable accommodation in higher education”.⁽⁶⁶⁾
- (vi) Honduras: in addition to a recommendation that there be a plan to transition to inclusive education, including in higher education, there was a specific point made that the “National Autonomous University of Honduras reinstate its course on sign-language interpretation”.⁽⁶⁷⁾
- (vii) Bosnia and Herzegovina: although there was concern that “Only limited accessibility is provided in higher education for students with disabilities”, there was no recommendation to deal with this: instead, there was a specific recommendation that the state “Incorporate inclusive education training into university curricula for future teachers and training programmes for current teaching staff, with an adequate budget”.⁽⁶⁸⁾
- (viii) Luxembourg: no specific concern relating to tertiary education was raised, but the recommendations made included that the state “ensure accessibility and allocate the resources necessary to guarantee reasonable accommodation, including assistant support staff, including pre-school and tertiary education and the private sector” and also “Adopt a legally defined procedure for the provision

(65) Concluding Observations on Ecuador UN Doc CRPD/C/ECU/CO/1 (27 October 2014), paras 36 and 37.

(66) Concluding Observations on Lithuania UN Doc CRPD/C/LTU/CO/1 (11 May 2016), paras 45 and 48.

(67) Concluding Observations on Honduras UN Doc CRPD/C/HND/CO/1 (4 May 2017), para 52.

(68) Concluding Observations on Bosnia and Herzegovina UN Doc CRPD/C/BIH/CO/1 (2 May 2017), paras 42 and 43.

of reasonable accommodation at all levels of education and allocate the resources necessary to guarantee reasonable accommodation according to individual requirements in consultation with the person concerned ...”⁽⁶⁹⁾

- (ix) Latvia: concern was expressed about “the lack of reasonable accommodation and accessibility, including physical accessibility, in the majority of mainstream schools and higher education and lifelong learning institutions”, leading to a recommendation that the state “allocate the resources necessary to guarantee reasonable accommodation to facilitate the accessibility of all students with disabilities to quality, inclusive education, including in preschool, tertiary and lifelong learning institutions”.⁽⁷⁰⁾
- (xi) Slovenia: concern was expressed about “The lack of accessibility and reasonable accommodation for persons with disabilities in tertiary education, including higher education institutions and vocational schools; ...”; the recommendation made was that the state “Provide lifelong learning for persons with disabilities and ensure accessibility and reasonable accommodation in all tertiary education institutions, including vocational and higher education schools; ...”.⁽⁷¹⁾
- (xii) Oman: although there was no specific concern raised, it was recommended that the state “Expand educational opportunities at the tertiary level for persons with disabilities, in particular deaf students, ...”.⁽⁷²⁾
- (xv) Macedonia: Although no specific concerns were raised, the Committee recommended that the state “Immediately enact a plan of transition to ensure inclusive education for persons with disabilities at all levels, including in higher education institutions” and “Ensure universal accessibility to educational premises, including universities; ...”.⁽⁷³⁾

As can be seen from these instances, the recommended steps were sometimes general (more accessibility, as in relation to Hong Kong, Macau; more efforts, albeit

(69) Concluding Observations on Luxembourg UN Doc CRPD/C/LUX/CO/1 (10 October 2017), para 43.

(70) Concluding Observations on Latvia UN Doc CRPD/C/LVA/CO/1 (10 October 2017), paras 40 and 41.

(71) Concluding Observations on Slovenia UN Doc CRPD/C/SVN/CO/1 (16 April 2018), paras 39 and 40.

(72) Concluding Observations on Oman UN Doc CRPD/C/OMN/CO/1 (17 April 2018), para 44(d).

(73) Concluding Observations on Macedonia UN Doc CRPD/C/MKD/CO/1 (29 October 2018), para 40.

in the context of praise for introducing sign language, as in relation to Austria; reasonable accommodation, as in relation to Lithuania; accessibility and reasonable accommodation, as in relation to Slovenia; a plan of transition and accessibility to premises, as in relation to Macedonia), and sometimes included more specifics (adapting the curriculum and premises in the case of Ecuador; not only referring to the concept of reasonable accommodation but also resource allocation, in relation to Latvia and Luxembourg, the latter also involving a reminder as to the need to consult with the student), including instances that were very specific (such as reference to a particular course in Honduras, to teacher training in Bosnia and Herzegovina, or to the needs in particular of deaf students in Oman).

A third grouping of observations, which differ in degree only from those in the second grouping with more detailed suggestions, were more comprehensive in the recommendation made. In this category can be placed:

- (i) Chile: the Committee expressed that it was “concerned at the lack of action by government authorities to promote inclusive higher education” and so called upon the government to do various things, including with relevance to tertiary education “(a) Implement a plan for transitioning towards inclusive education at all levels up to higher education, which provides for the training of teachers, the roll-out of comprehensive awareness-raising campaigns and the promotion of a culture of diversity; (b) Provide personalized instruction and the necessary support and resources, such as Braille and sign language, to foster inclusion, in particular of students with intellectual or psychosocial disabilities; (c) Ensure the accessibility of higher education institutions, including by facilitating reasonable accommodations in the admissions process and all other aspects of higher education; (d) Bear in mind the linkages between article 24 of the Convention and Sustainable Development Goal 4, in particular targets 4.5 and 4.8”.⁽⁷⁴⁾
- (ii) Portugal: there was concern “that even though the State party has a special quota for the admission of students with disabilities to public universities, it has not regulated the support universities should provide to such students. It is further concerned that there is restricted access to certain fields of study and professional degrees for students

(74) Concluding Observations on Chile UN Doc CRPD/C/CHL/CO/1 (13 April 2016), paras 49 and 50. The reference made to the link with the Sustainable Development Goals is repeated almost by rote in later Concluding Observations.

with particular disabilities”. This led to the recommendation that the country “introduce in its legislation regulations on the access of students with disabilities to higher education and vocational training on an equal basis with other students, while providing reasonable accommodation and the required support services”.⁽⁷⁵⁾

- (iii) Serbia: there was concern “about the low level of accessibility provided in higher education for students with disabilities” and hence a recommendation of “immediate steps to ensure that all persons with disabilities have access to inclusive and quality primary, secondary and tertiary education and that reasonable accommodation, in accordance with established individual education plans, is provided in mainstream education. It recommends that teachers and other education professionals receive training on inclusive education and that all secondary and tertiary education facilities be made accessible. The Committee stresses that denial of reasonable accommodation constitutes discrimination. ...”.⁽⁷⁶⁾
- (iv) Montenegro: concern was expressed about “The largely insufficient accessibility of higher education” and a recommendation made that the state “... progressively improve the accessibility of mainstream schools and tertiary education with time-bound goals, including the provision of reasonable accommodation and individual support, accessible environments, accessible and adapted school material and inclusive curricula ...”.⁽⁷⁷⁾
- (v) Panama: concern was expressed about “the lack of action by government authorities to promote inclusive higher education”. The recommended action included “the implementation of a plan to transition definitively to inclusive education at all levels, including in higher education; the plan should provide for the training of teachers and the necessary support and resources, such as Braille and sign language, to foster inclusion, in particular of students with intellectual or psychosocial disabilities and girls with disabilities. It also recommends that the State party ensure the universal

(75) Concluding Observations on Portugal UN Doc CRPD/C/PRT/CO/1 (20 May 2016), paras 47 and 48.

(76) Concluding Observations on Serbia UN Doc CRPD/C/SRB/CO/1 (23 May 2016), paras 49 and 50.
There was also a reference to SDGs.

(77) Concluding Observations on Montenegro UN Doc CRPD/C/MNE/CO/1 (22 September 2017), paras 44 and 45.

accessibility of educational premises, including universities. ...”⁽⁷⁸⁾

- (vi) Malta: although there were no specific concerns mentioned, it was recommended that the state: “ensure that students with disabilities, including students with intellectual or psychosocial disabilities, are provided with reasonable accommodation at all levels of education, and allocate the resources necessary to guarantee reasonable accommodation according to individual requirements in consultation with the person concerned, including the provision of learning support educators and their replacements when they are absent” and “Review the curriculum of students with disabilities through individualized education plans to ensure that the curricula allow them to learn the skills required to access the job market on an equal basis with others”⁽⁷⁹⁾

The different elements noted here, in addition to the matters of accessibility (Chile; Portugal, which had a reference to the need for legislative regulation, the context being that certain courses and professional programmes in particular were problematic; Serbia; Montenegro, which had reference to having a time-bound process; Panama) and reasonable accommodation (Chile, which makes specific reference to admissions as well as all aspects of higher education; Portugal; Serbia; Montenegro; Malta) are: plans for transition (Chile, Panama), training of teachers (Chile; Serbia, which also refers to other education professionals, Panama), comprehensive awareness-raising campaigns (Chile), promoting a culture of diversity (Chile), personalised instruction (Chile) or individual education plans (Serbia and Malta) or otherwise a reference to the need for individualisation (Malta, which refers to the need for consultation with the student), support and resources necessary for inclusion (such as Braille and sign language, Chile, Panama; or unspecified, Portugal, Montenegro) or learning support workers (Malta), accessible and adapted school material (Montenegro), inclusive curricula (Montenegro), and with a particular emphasis on certain groups (students with intellectual or psychosocial disabilities, Chile, Panama, Malta; and girls, Panama).⁽⁸⁰⁾ There is also reference to the need to equip students with the skills for the job market (Malta).

The obvious point to make is that these more detailed recommendations are

(78) Concluding Observations on Panama UN Doc CRPD/C/PAN/CO/1 (29 September 2017), paras 48 and 49.

(79) Concluding Observations on Malta UN Doc CRPD/C/MLT/CO/1 (17 October 2018), para 36.

(80) Reference is also made to the link with the Sustainable Development Goals.

of more general application: if the steps referred to have not been taken in any particular jurisdiction, they are examples of what has been suggested as appropriate to comply with the obligations undertaken in the CRPD. This therefore fills in some of the opacity of the text of Article 24(5), even as supplemented by the General Comment, as to how far it goes.

(d) Adding Other Rights into the Context for Understanding the Right to Education

In addition to reading all the above material as to the right to education in conjunction with the basic obligations in the CRPD, to which some reference is made in the comments noted above, it is also apparent that there are other rights in the CRPD to which reference should be made. For instance, there are various references noted above to questions of accessibility and awareness-raising, and also to the job market and hence the right to work. In its General Comment, the Committee on the Rights of Persons with Disabilities noted the interdependent position of the right to education, both in the sense that it would only be realised if other rights set out in the CRPD were respected but also in that its realisation supported other rights. This interdependence therefore places both other rights as a foundation for education and places education as a foundation for others; it might also be sensible to imagine this as a reinforcing circle. The Committee uses the following terms for this:

44. ... Education is integral to the full and effective realization of other rights. Conversely, the right to inclusive education can only be realized if certain other rights are implemented. Moreover, the right to inclusive education must be underpinned by the creation of inclusive environments throughout society. This will require the adoption of the human rights model of disability, which recognizes the obligation to remove societal barriers that serve to exclude and marginalize persons with disabilities and the need to adopt measures to ensure implementation of the rights set out below.

It then explains the interplay of these other rights. Some of these are fairly evident on any brief reflection. For example, the rights in the CRPD that will assist the realisation of the right to education if they are in turn respected include the Article 16 right to be safeguarded from violence and abuse clearly has implications relating to the need to avoid physical punishments from educators and also to prevent bullying and cyber-bullying;⁽⁸¹⁾ similarly

(81) Committee on the Rights of Persons with Disabilities *General Comment No 4 on the right to inclusive education*, CRPD/C/GC/4, 25 November 2016, [51].

people with disabilities are more likely to benefit from an inclusive education if their right to live in the community (Article 19) or in a family setting (Article 23) rather than in an institutional setting is respected,⁽⁸²⁾ and if their right to personal mobility, including through the provision of mobility aids when necessary, is put into effect (Article 20);⁽⁸³⁾ respecting the right to health (Article 25) and the right to habilitation and rehabilitation (Article 26) will also assist in making it possible for persons with certain disabilities to participate effectively in education.⁽⁸⁴⁾ In addition, the fact that education has to be viewed as involving not only academic learning but recreation and cultural activities (as guaranteed in Article 30) is noted.⁽⁸⁵⁾ The Committee also recognises that the right to access education has an instrumental role to play in helping to secure the right to participation in political and public life (Article 29): and as a result it suggests that the curriculum include citizenship and advocacy, and that steps be taken to ensure the students with disabilities can participate in student organisations.⁽⁸⁶⁾ Strangely, the Committee does not mention the link between education and the right to freedom of expression and opinion and to access information, which is guaranteed by Article 21.⁽⁸⁷⁾

However, the Committee does discuss various other rights that merit additional consideration of their link to the right to education:

- (i) The Article 5 right to equal protection (which builds on the primacy of non-discrimination principles in the UDHR and ICCPR, described above), which requires “affirmative action measures” to “address systemic and structural discrimination” and so ensure equal protection. The examples given are “removing architectural

(82) Committee on the Rights of Persons with Disabilities *General Comment No 4 on the right to inclusive education*, CRPD/C/GC/4, 25 November 2016, [52].

(83) Committee on the Rights of Persons with Disabilities *General Comment No 4 on the right to inclusive education*, CRPD/C/GC/4, 25 November 2016, [53].

(84) Committee on the Rights of Persons with Disabilities *General Comment No 4 on the right to inclusive education*, CRPD/C/GC/4, 25 November 2016, [54] and [55]: the Committee notes the importance of on-site monitoring and services, and of comprehensive assessments of needs.

(85) Committee on the Rights of Persons with Disabilities *General Comment No 4 on the right to inclusive education*, CRPD/C/GC/4, 25 November 2016, [58].

(86) Committee on the Rights of Persons with Disabilities *General Comment No 4 on the right to inclusive education*, CRPD/C/GC/4, 25 November 2016, [57].

(87) For a discussion of Article 21 and its link with academic conferences and matters such as promoting communications, see Gordon, S and Gledhill, K ‘*What Makes a Conference Good from a Service User Perspective*’ [2017] *International Journal of Mental Health and Capacity Law* 109 at 120-122,

and communicative or other barriers to mainstream education”.⁽⁸⁸⁾ As such, this links most obviously with question of the accessibility and adaptability elements of the right to access education.

- (ii) Intersectional discrimination against women and girls with disabilities, and its manifestation in violence or prejudice against educating females, has to be tackled. Such dual discrimination based on gender is prohibited by Article 6 of the CRPD. Realising this will assist the right to education of women and girls; and this provision is also one that involves education playing a supporting role, because “Education plays a vital role in combating traditional notions of gender that perpetuate patriarchal and paternalistic societal frameworks”.⁽⁸⁹⁾ This means that attention needs to be paid to ensuring that teaching materials and curricula avoid harmful gender or disability stereotypes.
- (iii) There is provision in Article 7 of the CRPD that the best interests of children with disabilities be given primacy, though it is also necessary for them to be consulted about their wishes. The Committee explains that education and participation has to be respected equally for children with disabilities, and notes that this applies “in their own learning and individualized education plans, within the classroom pedagogy, through school councils, in the development of school policies and systems, and in the development of the wider educational policy”.⁽⁹⁰⁾ This therefore supports some of the points noted above as to the importance of individualised learning, and also links with the participation processes that support Article 29.
- (iv) The obligation to combat stereotypes and explain the value of persons with disabilities is set out in Article 8 of the CRPD. This contains an instance of a specific reference to an overlap with the educational system, as Article 8(2)(b) requires measures for “Fostering at all levels of the education system, including in all children from an early age, an attitude of respect for the rights of persons with disabilities”. The

(88) Committee on the Rights of Persons with Disabilities *General Comment No 4 on the right to inclusive education*, CRPD/C/GC/4, 25 November 2016, [45].

(89) Committee on the Rights of Persons with Disabilities *General Comment No 4 on the right to inclusive education*, CRPD/C/GC/4, 25 November 2016, [46]. See also at [51] in relation to Article 16, the Committee noting that women and girls are more likely to be subjected to violence and hence to need protection.

(90) Committee on the Rights of Persons with Disabilities *General Comment No 4 on the right to inclusive education*, CRPD/C/GC/4, 25 November 2016, [47].

Committee makes the point that prejudicial attitudes may impede access to education, and so have to be countered. The way to do this is “to build a culture of diversity, participation and involvement in community life”, of which inclusive education is a part.⁽⁹¹⁾ An example to be noted here is that the Committee recommended in its concluding observations to El Salvador “promoting disability education as a cross-cutting theme in university courses”.⁽⁹²⁾

- (v) The overlap with Article 9, the right to accessibility, is clear from the indications given above. The Committee sets out the various features to which accessibility standards must apply: “an accessible built environment, including schools and all other places of education, and ... accessible public transport, services, information and communications technologies. Modes and means of teaching should be accessible and teaching should be conducted in accessible environments. The whole environment in which students with disabilities learn must be designed in such a way as to foster inclusion”. It is also noted that “Inclusive education is also a powerful tool for the promotion of accessibility and universal design”.⁽⁹³⁾
- (vi) One of the most important provisions of the CRPD is Article 12, which requires in relation to people with impaired mental capacity to make decisions an approach of supported decision-making rather than the common approach of substituted decision making: the former involves working out what the person wants (and so reflects their autonomy, or their legal capacity to exercise rights) whereas the latter involves what is supposedly in the best interests of the person, but represents something that is handed down and so replaces autonomy. The Committee notes that, particularly for students with psychosocial or intellectual impairments, inclusive education should build confidence as to the exercise of their legal capacity and reduce the need for supported decision making.⁽⁹⁴⁾ Accordingly, this is an example of education having an instrumental role in supporting another right.

(91) Committee on the Rights of Persons with Disabilities *General Comment No 4 on the right to inclusive education*, CRPD/C/GC/4, 25 November 2016, [48].

(92) Concluding observations El Salvador UN Doc CRPD/C/SLV/CO/1* (8 October 2013, para 22.

(93) Committee on the Rights of Persons with Disabilities *General Comment No 4 on the right to inclusive education*, CRPD/C/GC/4, 25 November 2016, [49]. See also [22]-[24], for the discussion of the accessibility component of the right to education.

(94) Committee on the Rights of Persons with Disabilities *General Comment No 4 on the right to inclusive education*, CRPD/C/GC/4, 25 November 2016, [50].

(e) The Right to Work or Join a Profession

One right that gets a limited reference is the Article 27 right to work. Whilst the Committee notes the function of education in preparing persons with disabilities for participation in the labour market, by giving them the necessary “knowledge, skills and confidence”,⁽⁹⁵⁾ it could have gone further. In particular, there is an area of tertiary education that most obviously links to one aspect of the job market, namely the circumstances in which a pre-requisite to a particular career (either de jure, as in various regulated professions, or de facto, in that the market requires certain qualifications) is completion of a university degree.

In relation to the legal profession, this has been commented on in several recent Concluding Observations relating to Article 13, the right of equal access to justice. For example, the Committee expressed its concern that the Russian Federation “has not formulated policies to empower persons with disabilities to participate in the justice system as direct or indirect participants, such as lawyers, court officers or law enforcement officials” and recommended increased efforts in this regard.⁽⁹⁶⁾ Similarly, in the case of Malta, there was an expressed concern as to “the absence of policies to empower persons with disabilities to participate in the justice system as direct or indirect participants, such as lawyers, court officers or law enforcement officials”, for which it was suggested that the state increase its efforts.⁽⁹⁷⁾

In relation to various other jurisdictions, the concern was not expressed in relation to policies but in relation to the taking of relevant steps: the only real difference between the different comments was whether there was a reference to professionals in the justice system, or to judges, court officials, prosecutors, the legal profession, law enforcement officials or a combination of these different groups. Hence, Panama was recommended to “Take steps to empower persons with disabilities with a view to their participating as professionals in the justice system...”,⁽⁹⁸⁾ the UK to “Take measures to empower persons with disabilities to work in the justice system as judges, prosecutors or in other positions, with the provision of all necessary support”,⁽⁹⁹⁾ and Luxembourg to

(95) Committee on the Rights of Persons with Disabilities *General Comment No 4 on the right to inclusive education*, CRPD/C/GC/4, 25 November 2016, [56].

(96) Concluding Observations on the Russian Federation UN Doc CRPD/C/RUS/CO/1 (9 April 2018), paras 30 and 31.

(97) Concluding Observations on Malta UN Doc CRPD/C/MLT/CO/1 (17 October 2018), paras 21 and 22.

(98) Concluding Observations on Panama UN Doc CRPD/C/PAN/CO/1 (29 September 2017), para 33(e).

(99) Concluding Observations on the UK UN Doc CRPD/C/GBR/CO/1 (3 October 2017), para 32(e).

“Take measures to address the underrepresentation of persons with disabilities in the legal profession” (paragraph 27(c)).⁽¹⁰⁰⁾ Haiti was recommended to “Adopt measures to ... empower [persons with disabilities] to work as judges or prosecutors”,⁽¹⁰¹⁾ and the steps Slovenia was recommended to take included “Stepping up its efforts to empower persons with disabilities to be part of the justice system as direct and indirect participants, such as lawyers, court officials or law enforcement officials”.⁽¹⁰²⁾ In the case of Oman, the recommendation made was that the state “Adopt measures to support and empower persons with disabilities to work in the justice system as judges, prosecutors, lawyers or court staff, providing all necessary support to ensure greater access to justice by persons with disabilities”.⁽¹⁰³⁾ In the case of South Africa, it was suggested that there be systematic training of judicial and law enforcement officials, “including involving persons with disabilities as judicial officials”.⁽¹⁰⁴⁾

III. Implementing the Right to Tertiary Education – The Role of Law Schools

It is suggested that, based on the discussion above, the following features emerge as to the right to tertiary education for persons with disabilities, of which a law degree is an example:

- (i) It is clearly established that there is a right to education: and that this right is one that has to be given effect to in the context of non-discrimination principles, which means inclusive education (rather than segregated). Inclusive education is of benefit not just to persons with disabilities in terms of securing their right to education, but benefits society as a whole by creating an appreciation of the value of human diversity and of the human rights framework which supports participatory democratic society. These matters emerge from the purpose of the human rights regime put in place since the formation of the UN, and the reason for it having had non-discrimination at its core, described in Part I, and the inclusive education principles described in Part II.
- (ii) As a right which, at least in the UN system, is in the economic,

(100) Concluding Observations on Luxembourg UN Doc CRPD/C/LUX/CO/1 (10 October 2017), para 27(c).

(101) Concluding Observations on Haiti UN Doc CRPD/C/HTI/CO/1 (13 April 2018), para 25(d).

(102) Concluding Observations on Slovenia UN Doc CRPD/C/SVN/CO/1 (16 April 2018), para 21(d).

(103) Concluding Observations on Oman UN Doc CRPD/C/OMN/CO/1 (17 April 2018), para 28(d).

(104) Concluding Observations on South Africa UN Doc CRPD/C/ZAF/CO/1 (23 October 2018), para 25(c).

social and cultural right category, this means that it has to be fulfilled progressively through the use of the maximum of available resources. This standard should not be much of a problem in relation to richer countries, which have the resources to fulfil the right (and will benefit from an educated community). In any event, the non-discrimination aspects of the right to education mean that access to whatever is available generally has to be secured on a non-discriminatory basis, as this is a non-resource-dependent civil and political right. For persons with disabilities, this means that reasonable accommodation has to be provided so that access to what is available is secured on terms of substantive equality (ie with such supplements as are not unduly burdensome to overcome the impact of any impairment). This is discussed in Part IIC in particular.

- (iii) Despite the right to access such education as is provided in a state being expressed as applying to all levels of education, including tertiary and life-long learning, there is clearly a difference of emphasis in that the compulsory elements of education are at the primary and increasingly the secondary level, whereas a different approach applies to tertiary education. In the initial conception of it, it has not been seen as solely a matter of choice for the individual but a matter that can be restricted on the grounds of merit or capacity to undertake study at that level: see the description given above in Part IIA and C. Although the CRPD makes no such reference, its focus is on making sure that whatever process is applied, there is no discrimination on the basis of disability, with a reminder that the way to secure that includes removing barriers, ensuring that there is reasonable accommodation and considering affirmative action: see Part IIB and C.⁽¹⁰⁵⁾
- (iv) It is apparent from various comments made by the Committee on the Rights of Persons with Disabilities that there remain concerns about the low levels of take up of tertiary education by persons with disabilities, and there have been a variety of calls recently for making sure that more persons with disabilities are engaged in parts of the justice system, including in roles that will invariably require a tertiary education to secure a law degree: this is described in Part IIC.

(105) This paper does not consider the interesting question about whether tertiary education and intellectual merit should continue to be linked in the way that appears to be the assumption behind the UDHR and ICESCR.

- (v) The Committee on the Rights of Disabilities has given a significant amount of guidance on what steps can be taken to ensure that the right of access to tertiary education can be enjoyed on equal terms by persons with disabilities. This includes making sure that a variety of other rights under the CRPD that will affect participation in tertiary education are met: and also that a range of steps is taken to secure reasonable accommodation on the facts of the individual case (which will be less necessary if principles of universal design are followed). This is described in Part IIC.

On this analysis, there remains a problem that persons with disabilities are not obtaining their right to access tertiary education on an equal basis with others. This is a matter of concern for law schools as well, particularly given the identified need to have more persons with disabilities involved as professional participants in the justice system, for which a law degree may invariably be a pre-requisite. This is one reason law schools should take a particular role in seeking to redress the imbalance. Additional reasons include that the situation involves a “right” and hence a legal construct that has consequences and ways of approaching it: for instance, it can only be a right if someone has a corresponding obligation, and human rights have the special approach of having to be construed to be “practical and effective”, namely respected in practice, possibly with the elucidation of various specific sub-rights in order to secure the high-level statements of rights found in the text of a human rights treaty.⁽¹⁰⁶⁾

In this regard, whilst there is much to be said for the contention that human rights obligations created at the international level should rest directly on all in society, including corporate entities (whether trading companies or companies of scholars who form a university), the approach apparent in human rights treaties is not to seek to create self-executing obligations that can bind people and legal persons directly, but rather to require the state to make the necessary statutory or other arrangements to ensure that non-state actors are bound as a

(106) This phrase is used by the European Court of Human Rights in relation to its decisions under the European Convention on Human Rights (Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, 1950: CETS No 5; available at <http://conventions.coe.int/treaty/en/treaties/html/005.htm> (last accessed 8 April 2019)). For example, in *Airey v Ireland* App no 628973/, (197980-) 2 EHRR 305, it commented at [24], it commented that “The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective”. The context was the Court’s conclusion that legal aid had to be made available if it was necessary to secure a fair trial in a civil matter even though the Convention is express as to legal aid only in relation to criminal charges.

matter of domestic law.⁽¹⁰⁷⁾ However, a state will only have to act to regulate the conduct of third parties and compel them to do something if they are not doing it in any event. Law schools, naturally, are the obvious body within a university to advise on what steps an institution should take to comply with the obligations that arise, including those that will arrive through domestic regulation if there is no voluntary respecting of the rights set out in the CRPD for students with disabilities.

A similar chain of reasoning is that law schools should have a significant role in explaining some of the core concepts that underpin compliance with the CRPD. There is no claim to be made that this is exclusively a legal academic's domain, because human rights concepts can be understood by all: rather, the point is that the standards discussed above are all legal standards and therefore legal academics are naturally positioned to explain them to the relevant audience. Indeed, it is sensible for legal academics to make sure that they take an interdisciplinary approach to this, reflecting their own limitations. For example, the Committee on the Rights of Persons with Disabilities will often point to the importance of ensuring that there is a disability perspective taken: but a legal academic will not know how best to ensure that such a perspective is taken. Similarly, the legal academic can explain the concept of universal design, but it is the architects and engineers, and the computer scientists and the others who design the spaces in which we live and work who can give effect to that. Equally, the legal academic can explain the legal concept of a reasonable accommodation or the principles of inclusivity: but the views of others will be necessary to give effect to what that means in a particular situation.

As to what can be done, two relevant sources of examples apparent from the description above are the Committee on the Rights of Persons with Disabilities and UNESCO. The latter conducted a review of the implementation in practice of its Convention Against Discrimination in Education 1960 in the context of persons with disabilities in 2015: *The Right to education for persons with disabilities: overview of the measures supporting the right to education for persons with disabilities reported on by Member States*.⁽¹⁰⁸⁾ This gives examples

(107) This is discussed further in Gledhill, K 'Tertiary institutions and human rights obligations', (2019) *Educational Philosophy and Theory*, DOI: 10.1080/00131857.2018.1564277.

(108) UNESCO, *Monitoring of the Implementation of the Convention and Recommendation against Discrimination in Education (8th Consultation): The Right to education for persons with disabilities: overview of the measures supporting the right to education for persons with disabilities reported on by Member States, 2015*, available at <https://unesdoc.unesco.org/ark:/48223/pf0000232592>. ["UNESCO Overview 2015"]

of steps taken by states, including in the tertiary sector, but also provides a more systematic account, prefaced in part on the role of Article 24 of the CRPD.⁽¹⁰⁹⁾ The thematic analysis notes a variety of areas where action can be taken, ranging from constitutional and legal structure to specific actions. Each of these areas can be applied to the tertiary education sector and prompt suggestions for steps that can be taken by law schools:

- (i) The need for stronger legal frameworks, including having a domestically-recognised right to education that exists in the context of prohibiting discrimination based on disability (and hence including reasonable accommodation).⁽¹¹⁰⁾ Law schools are a natural source of analysis of the adequacy of what is in place and of what is needed to ensure that the legal framework is compliant with international obligations. This could be a matter for research for legal academics. Alternatively, it could be a project involving students, perhaps as a form of capstone project for advanced students: it would involve the students researching the international legal obligations, assessing the compliance of the domestic regime, suggesting what needs to change, perhaps assessing comparative standards to determine how they could be adapted to the domestic regime, perhaps drafting a shadow report as part of the process whereby UN bodies monitor compliance with rights.⁽¹¹¹⁾
- (ii) The need for inclusive policies and strategies, covering such matters as expanding opportunities for persons with disabilities, ensuring inclusive learning environments, training educators, modifying curricula and so on.⁽¹¹²⁾ Again law schools can advise both at the national and institutional level on the need for policies and strategies, though this would be a good opportunity for cross-disciplinary collaboration, particularly with colleagues in education faculties or departments as to the content of the relevant policy or strategy.
- (iii) Ensuring accessibility, including by way of financial support,

(109) See also the systematic analysis at Committee on the Rights of Persons with Disabilities *General Comment No 4 on the right to inclusive education*, CRPD/C/GC/4, 25 November 2016, [12], and the comments at Part IIC(2) above.

(110) UNESCO Overview 2015, p13. The report also notes that Sweden has a specific statutory duty on institutions to actively prevent discrimination based on disability: p105.

(111) See Gledhill, K 'Establishing an International Human Rights Clinic in the New Zealand Context', (2013) 19 International Journal of Clinical Legal Education p295-310, at 304-307, for a brief account of what can be done in this regard.

(112) UNESCO Overview 2015, pp13-14.

making physical changes to locations, and having temporary special admissions.⁽¹¹³⁾ Various examples are given: Croatia has a favourable admission process and also favourable arrangements for access to university living accommodation based on disability;⁽¹¹⁴⁾ France has imposed statutory requirements as to accessibility of universities, including their dining and residential facilities;⁽¹¹⁵⁾ Mauritius has both scholarships and also processes for paying the taxi fares of students who cannot use public transport because of their impairment;⁽¹¹⁶⁾ and New Zealand reported a special grant system for persons with disabilities as well as other under-represented groups.⁽¹¹⁷⁾ This is another area on relation to which law schools can provide a lead in setting out what is the obligation, which in CRPD terms would also refer to such matters as the Article 9 right to accessibility, though again there would be cross-disciplinary collaborations with university administrators and academic colleagues in working out the details of what is required. There are research possibilities here: auditing tools and audits as to deficits and also examples of good practice, for example.

- (iii) The need to adapt the form and content of education, including making adaptations to meet the needs of persons with disabilities (naturally, on an individualised basis), including in the area of exams and assessments and ICT, possibly with alternative methods of delivery.⁽¹¹⁸⁾ Specific examples in the tertiary sector include Czech legislation that allows provision to be made for students with disabilities to spend an additional two years on their programme, and also allows the hiring of support workers and the making of individualised education plans;⁽¹¹⁹⁾ the French report refers to various possibilities, including tutoring, assistance, note-takers, sign language interpreters, and cued speech interpreters.⁽¹²⁰⁾ Again, law schools can provide a lead in relation to the obligation, which is an example of the wider need

(113) UNESCO Overview 2015, pp14-15.

(114) UNESCO Overview 2015, p41.

(115) UNESCO Overview 2015, p56.

(116) UNESCO Overview 2015, p72.

(117) UNESCO Overview 2015, p84.

(118) UNESCO Overview 2015, pp15-17.

(119) UNESCO Overview 2015, p45-46.

(120) UNESCO Overview 2015, p56.

for reasonable accommodation, ie making changes to ensure a level outcome. This should also be a cross-disciplinary process, involving educators, computer scientists, and so on, who will be better placed to determine what can be done in terms of the adaptations.

- (iv) Monitoring processes are needed, and therefore data collection.⁽¹²¹⁾ To the extent that such processes may be built with consequences for non-compliance, law schools will be in a position to advise on what is needed for due process in such a setting, as well as explaining the importance of such monitoring in light of the need for human rights to be effective.
- (v) The right to education must be promoted.⁽¹²²⁾ Naturally, law schools can advise on this being an obligation arising, though other departments may be better placed to advise on how best to implement it.

At the more pragmatic level, the leading question is the identification of steps to secure the legal requirements of equal accessibility, which may also involve reasonable accommodation in an individual case. Anastasiou, Gregory and Kauffman suggest that reasonable accommodation requires action in at least three areas, namely adjustments to premises, modifications of testing and assessment, and providing readers or interpreters; but they add that the CRPD Committee has also identified two additional areas, namely curriculum adaptations (eg handouts in alternative formats and having note takers) and the use of assistive technology in both learning and assessment situations.⁽¹²³⁾ Adjustments to premises could be viewed as also (and perhaps more naturally) an access right, with universal design principles in play, albeit that it might come to light in relation to the need to ensure that a particular student can secure access; similarly, adjustments to testing requirements if they relate to entrance standards to an institution could be seen as an access matter.

In its *General Comment No 4 on the right to inclusive education*, the Committee has set out a variety of steps that might be taken,⁽¹²⁴⁾ with the

(121) UNESCO Overview 2015, p17.

(122) UNESCO Overview 2015, pp17-18.

(123) D Anastasiou, M Gregory and JM Kauffman 'Art 24 Education' in I Bantekas, MA Stein and D Anastasiou (Eds) *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (OUP, Oxford, 2018), 682-683.

(124) Committee on the Rights of Persons with Disabilities *General Comment No 4 on the right to inclusive education*, CRPD/C/GC/4, 25 November 2016, [30].

starting point being the reminder of the need for individual consideration as different students with the same impairment may need a different approach (which, naturally, involves full consultation with the person involved). The Committee notes that this should also be approached on a system-wide basis, with institutions pooling and sharing relevant resources. As to the specific steps that can be taken, it refers, first, to:

changing the location of a class; providing different forms of in-class communication; enlarging print, materials and/or subjects in signs, or providing handouts in an alternative format; and providing students with a note taker or a language interpreter or allowing students to use assistive technology in learning and assessment situations. ... allowing a student more time, reducing levels of background noise (sensitivity to sensory overload), using alternative evaluation methods and replacing an element of the curriculum with an alternative ...

Reference can also be made to the various comments in Concluding Observations set out above in PartIIC(2). These refer to systematic steps (legislative regulation, awareness raising and promoting a culture of diversity, inclusive curricula) and steps that will differ according to the needs of the particular student (plans for transition, individual education plans, learning support workers, adapted materials).

How could this translate in a law school that was willing to be at the forefront of promoting compliance with the CRPD. This can be split into engagement with government and society more generally, engagement with other professionals (ie the legal profession and the university community), and engagement with students. In the first two categories, part of the role of legal academics will be to help to explain the obligations as to non-discrimination and inclusion (both that they exist and what they are): this can be seen as part of the critic and conscience role that is a familiar part of university life. Naturally, government lawyers and the lawyers in the profession may have the relevant skills to be aware of this: but governments may have other matters that are more pressing and so not give appropriate priority to the obligations undertaken on ratifying the CRPD, and practicing lawyers may have too much of a focus on individual cases before them to give appropriate priority to systematic features such as ensuring that they encourage persons with disabilities into the profession.

Of course, it goes without saying that law schools will have a better basis from which to have an impact if their own house is in order. Accordingly, here are some suggestions. First, there is the fundamental point that there

should be the involvement of persons with disabilities in the process, since that is consistent with various motifs in the CRPD, including respecting their expertise: alumni with disabilities (and other practitioners with disabilities) should be consulted as to what more could have been done for them, and relevant representative groups should also be engaged. Secondly, most law schools take part in processes for recruiting students: this is a good opportunity for emphasising that obligations exist on the legal profession to encourage persons with disabilities to become part of it and that law schools therefore have a part to play in ensuring that there is a culture of inclusivity; this would also be a relevant moment for considering whether a law school should have some form of targeted admissions, perhaps in the form of special scholarships or priority in terms of university accommodation and other practicalities that can affect whether a student attends.

This leads to the third area, namely admissions: consideration will have to be given of the range of reasonable accommodations that have to be considered. If, for example, a law school has admissions exams, these will have to be adapted if that is necessary for certain students – for example, Braille versions, having intermediaries read out the exam, or having it printed in extra large type for students with vision impairments, depending on the nature of the impairment; allowing extra time for students with cognitive impairments that mean they require extra time to process information; ensuring a distraction free environment to take the exam for students with impairments that make an exam room difficult; allowing alternative methods of answering for students with impairments that affect their writing abilities.⁽¹²⁵⁾

Fourthly, there is the question of student life, both academic and extra-curricular. This covers a wide variety of scenarios, of which examples can be given, some of which have been noted already above and clearly apply in a law school setting. In the case of students whose impairment is based on mobility, universal design principles entail the incorporation of ramps, lifts and the like (that can be used by all); and if they are not provided, arrangements should be in place to ensure that the lecture rooms in which the student studies are accessible, a matter which those constructing the timetable can ensure. The process of

(125) As has been mentioned already, this paper rests on the assumption that the same academic merit is required, though two things should be noted. First, if reasonable adjustments have not been made during the secondary school career of the student, their apparent academic merit may be understated; secondly, the legal profession has roles for people with a variety of levels of intellectual ability, for which a law degree may be useful, and so a level of flexibility in relation to intellectual impairments may be appropriate.

teaching may need to have some minor adjustments: for example, ensuring that handouts are in accessible formats, providing sign-language interpretation or a note taker or a transcript of a lecture. It may also be necessary to think about the curriculum: for example, if there are instances of legislation or of jurisprudence that rest on discriminatory attitudes, ensuring that they are critiqued could be an important part of building a culture of inclusion. The process of assessment will need consideration: similar points can be made here as in relation to entrance examinations; note also the possibility that impairments may have an impact on the ability of a student to complete a programme of study within a particular time, and so creating individualised timetables for progress may be necessary.

Most law schools will have student associations and the like, which may be supported by the school. Arrangements will have to be in place to ensure that they abide by inclusive principles. In addition, disciplinary processes within the institution will have to make provision to deal with bullying or other behaviour that is inconsistent with building an inclusive atmosphere.

These illustrations are very much that: the range of impairments is vast, and the response to each of them will require considered input from those with the relevant expertise, which may be colleagues in education departments, colleagues in science, colleagues in health, and so on. It is a journey to securing the interests of disadvantaged peoples that rests on legal rights and principles: and so one in which legal academics have an important role to play.

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